cross-examination is considered this must be open to grave doubt:—

Q. Accused held the parcel in his right hand throughout?
A. Yes.

Q. Is accused bigger than you?
A. Yes.

Q. He never dropped it?
A. No.

Q. The struggle was not violent? (No answer).

Q. How did you hold the accused?
A. By his belt.

Q. With two hands?
A. One hand.

Q. Did you hold him with one hand the whole time?
A. Yes.

Q. What did you do with the other hand?
A. Nothing.

I find it very difficult, upon the evidence, to believe that the appellant tried to run away. Moreover, he at once told the detective how he had come by this parcel. He said that he had got it from Ah Hoat, and he said that Ah Hoat was at the Empress Hotel. And he asked the detective to go to the Empress Hotel — an admission which appears from the record to have been extracted from the detective with some difficulty because at first he refused to answer.

But in arguing this appeal Mr. Hill, on behalf of the respondent, says that when it was proved that the appellant was carrying the parcel the burden of proof shifted, by virtue of the provisions of section 37(d), and the burden was then on the appellant to prove that he did not know what was in it. He referred to a passage from the decision of the Court of Criminal Appeal in *Toh Ah Loh and Mak Thim v. Rex*[2] where they laid down three characteristics which were necessary to constitute criminal possession. The third characteristic (which I quoted from their judgment) was: "(c) he must be conscious of the possession of the thing." But if that passage is read in conjunction with the previous paragraph of the judgment in *Ho Seng Seng's case*[1] it is clear that the decision in that case was that before the burden of proof shifted:—

"the onus was upon the prosecution to prove to the satisfaction of the Court that the appellant knew that a dangerous drug was in the basket. If they had proved that, then section 37 (d) would have raised the presumption that the appellant was in possession of it and knew that it was opium."

The head-note to that case correctly records the decision. But it is necessary again to stress that *Ho Seng Seng's case*[1] relates solely to the shifting of the burden of proof under section 37(d). As was pointed out in the unreported Magistrate's appeal No. 57 of 1949, which is referred to in *Ho Seng Seng case*[1]: "in ordinary cases the circumstances are such that the Court can, in the absence of evidence to the contrary infer knowledge". The case of *Sim Chwee Chua v. Rex*[3] affords an example of a Court properly inferring knowledge from the circumstances. No question arose in that case of invoking section 37(d). The present case might have afforded a similar example if the two pieces of evidence which are relied upon had been stronger than they were. But from the record of the cross-examination of the detective I am not satisfied that the appellant tried to run away. And the fact that he immediately told the detective (in answer to a question) about Ah Hoat and asked him to go to the Empress Hotel — a fact to which no allusion is made in the grounds of decision — in my opinion renders the defence story much less "fantastic" than seems to have been thought. And upon the view which I take of the evidence as a whole it does not exclude the possibility that the appellant may have been an innocent carrier who was not aware of the contents of the parcel.

The appeal must, therefore, be allowed and the conviction quashed.

Appeal allowed.

Solicitors for the appellant: *Allen & Gledhill.*

CHEN PANG KWEE v. MERU TIN LIMITED.

[C. A. (Mathew, C.J., Pretheroe and Buhagiar, JJ.) November 23, 1953]

[Ipoh — F.M. Civil Appeal No. 55 of 1952]

Courts Ordinance 1948 s. 37(1)(b) — Application of — Consent of parties to order obtained in lower court — Competence of the Court of Appeal thereafter.

This was a motion for leave to appeal to Her Majesty in Council from a decision of the Court of Appeal which declared itself incompetent to hear the appeal and thereby dismissed it.

At the hearing of the appeal the respondents (defendant Company) took a preliminary objection to the competency of the appeal on the ground that the decree of the Court below appealed against was made by consent and that there was embodied an undertaking not to appeal.

Held: section 37(1)(b) of the Courts Ordinance, 1948 expressly provides that no appeal shall be brought to the Court of Appeal where the judgment or order is made by consent of the parties, and therefore there were no merits whatsoever in the application.

Case referred to:—

(1) *Robert Murray Burgess v. Andrew Morton* (1896) A.C. 136.

COURT OF APPEAL.

Lee Ah Seong for the appellant.

C. W. Shuttleworth for the respondents.

The judgment of the Court was delivered by :—

Mathew, C.J. : — This is a motion for leave to appeal to Her Majesty in Council from a decision of the Court of Appeal given at Ipoh on the 4th day of February, 1953.

In an action in the High Court at Ipoh (Civil Suit No. 134 of 1950) an order was made in the following terms :—

"This suit coming on for hearing on the 30th and 31st days of January, 1952 and the 4th and 5th days of February, 1952 before the Honourable Mr. Justice Thomson in the presence of Mr. F. G. Charlesworth, Mr. M. N. Cumarasami and Mr. C. N. Lim of Counsel for the plaintiff and Mr. J. M. M. Lewis and Mr. K. MacDuff of Counsel for the defendants and upon reading the pleadings herein and upon hearing the evidence adduced on behalf of the plaintiff and the defendants and upon the parties hereto by their respective Counsel intimating to the Judge that they had reached a settlement upon the following terms, *viz* :—

(i) That the defendant Company should pay the plaintiff $2,461.11 in respect of tin ore remaining with the defendant Company for sale on behalf of the plaintiff at the termination of the agreement between them;

(ii) That the defendant Company should pay the plaintiff's taxed costs down to the time of the settlement;

(iii) That the defendant Company's counterclaim should be dismissed;

(iv) That in addition to damages in respect of the tin ore sold by the defendant Company on behalf of the plaintiff the plaintiff should have such further damages as might be assessed by the Judge;

(v) That the question of certifying for the fees of a second Counsel should be left to the Judge;

(vi) That in respect of the matters left to the Judge under heads (iv) and (v) Counsel should not be further heard;

(vii) That there should be no appeal;

and the plaintiff and the defendants by their respective Counsel agreeing that the decision of the Judge on terms (iv) and (v) hereinbefore mentioned shall be final and undertaking not to appeal from such decision, THIS COURT DID ORDER that the suit do stand over for judgment.

And this suit standing this day in the paper for judgment in the presence of Mr. C. N. Lim of Counsel for the plaintiff and Mr. J. M. M. Lewis of Counsel for the defendants THIS COURT DOTH BY CONSENT ORDER :—

(i) That the defendant Company do pay the plaintiff $2,461.11 in respect of tin ore remaining with the defendant Company for sale on behalf of the plaintiff at the termination of the agreement between them;

(ii) That the defendant Company do pay the plaintiff's taxed costs on the claim and on the counterclaim down to and including the appearance of Counsel before the Judge in Chambers on the 5th day of February, 1952;

(iii) That the defendant Company's counterclaim be dismissed.

AND THIS COURT DOTH FURTHER ORDER that in addition to damages in respect of the tin ore sold by the defendant Company on behalf of the plaintiff as aforesaid the defendant Company do pay the plaintiff the sum of $30,000 in respect of all other damages claimed by the plaintiff in these proceedings.

AND THIS COURT DOTH CERTIFY fees for two Counsel."

The plaintiff (the present applicant) appealed from this judgment to the Court of Appeal. At the hearing of the appeal, the respondents took a preliminary objection to the competency of the appeal on the ground that the decree of the Court below appealed against was made by consent and that there was embodied an undertaking not to appeal.

It is important to point out that the parties had agreed to leave a question of fact, i.e. the assessment of damages in respect of tin ore sold by the defendant Company on behalf of the plaintiff, to the Judge of the High Court; it was further agreed that Counsel should not be further heard on this matter and that there should be no appeal. These damages were assessed by the Judge at $30,000. The learned Judge was invited to sit practically as an arbitrator upon that question in dispute and his decision must be regarded as final.

The Court of Appeal declared itself incompetent to hear the appeal and dismissed the appeal.

We considered that there were no merits whatsoever in the application.

With regard to that part of the Order of the High Court expressly declared to be made by consent, section 37(1)(b) of the Courts Ordinance, 1948, applies; that section expressly provides that no appeal shall be brought to the Court of Appeal where the judgment or order is made by consent of the parties.

With regard to that part of the Order awarding the plaintiff the sum of $30,000, as assessed by the learned Judge, the Court of Appeal was not competent to entertain the appeal (see *Robert Murray Burgess v. Andrew Morton*[1]).

For the above reasons the motion was dismissed.

Motion dismissed.

Solicitors for the appellant: *Leong Yew Koh & Co.*

Solicitors for the respondents: *Maxwell, Kenion, Cowdy & Jones.*

JAYAL SINGH v. LEONG YUNG KWOK.

[O. C. J. (Bellamy, J.) December 16, 1953]

[Malacca — Civil Suit No. 50 of 1952]

Moneylenders Ordinance (Cap. 218) & Moneylenders Ordinance, 1951 — Onus of proof — Some degree of system and continuity in moneylending transactions must be proved.

The plaintiff received a cheque for $5,000 from the defendant in consideration for loans that he had made from time to time to the defendant. The defendant having instructed his bankers to withhold payment of it the cheque was dishonoured when the plaintiff presented it for payment to the defendant's bankers. He now sues for the amount of the cheque. The only defence set up by the defendant is the plea that the plaintiff was a moneylender within the meaning of the Moneylenders Ordinances, at the relevant times.

Held: as there was sufficient evidence to prove some degree of system and continuity in moneylending transactions the plaintiff was prima facie a moneylender within the meaning of the Moneylenders Ordinances and as he has failed to prove to the contrary, the claim fails.

Cases referred to:—

(1) *Edgelow v. MacElwee* (1918) 1 K.B. 205.

(2) *Litchfield v. Dreyfus* (1906) 1 K.B. 584.

(3) *Newton v. Pyke* 25 T.L.R. 127.

(4) *Esmail Sahib v. Noordin* (1951) M.L.J. 98.

ACTION.

S. Shunmugam for the plaintiff.

C. S. Jayaswal for the defendant.

Cur. Adv. Vult.

Bellamy, J.: — By a specially indorsed writ issued on the 3rd day of November 1952 plaintiff sues the defendant for the sum of $5,000, the amount of a cheque drawn by the defendant on his bank, Hongkong and Shanghai Banking Corporation, Malacca branch, on the 1st September, 1952, payment therein being expressed to be to "cash or bearer". The plaintiff received this cheque from the defendant in consideration for loans that he had made from time to time to the defendant, and, having entered an appearance to the writ, the only defence set up by the defendant is the plea that the plaintiff was a moneylender within the meaning of the Moneylenders Ordinance (Chapter 218) and the Moneylenders Ordinance, 1951 at the times when he lent the defendant the moneys in respect of which the cheque sued upon was drawn and given to the plaintiff.

When the case came on before me for trial I ruled on the pleadings that the onus was on the defendant to satisfy me that the plaintiff was a moneylender as alleged.

There is no dispute that the plaintiff is, and at all material times was, a watchman in the employment of Chop Tong Yik Chan & Company, goldsmiths, of Nos. 3-5, Kampong Pantai, Malacca, and that the defendant, although at present unemployed, was at all material times one of the trustees of his late father's estate from which he derived, as trustee, an income of $500 a month, and that he lived, as he still does, in what has been described as the "family house" at No. 35, Tranquerah Pantai 2, Malacca.

The evidence of the defendant is that in August 1951 the plaintiff agreed to lend him $3,500 at interest at the rate of sixty per centum per annum, such interest to be payable monthly in advance. In pursuance of this agreement, on the 30th August, 1951, the plaintiff lent him $3,500, and having deducted $175 for interest as agreed, the plaintiff actually handed to him $3,325, and he drew a cheque for $3,500 on his bank, Hongkong & Shanghai Banking Corporation, Malacca branch, in favour of the plaintiff, post-dated the 30th September, 1951 and this cheque was given to the plaintiff by way of security for the loan.

On the day this cheque was payable, but before it was presented, the plaintiff met the defendant, and the defendant informed him that he still required the use of the money. The plaintiff then agreed to an extension of time for repayment of the loan and, having persuaded the defendant to draw a fresh cheque in his favour for the same amount, he received from the defendant $175 in cash, being a further month's interest in advance on the loan, and a cheque post-dated the 30th October, 1951, and the plaintiff thereupon